IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

WILLIAM LEPPER, a single man, and CHRIS RACUS, a single man, Plaintiffs/Appellants, v. KATHY PREBLE-COLLINS, an Arizona licensed broker, dba SIERRA SHADOWS REALTY; and KATHY PREBLE-COLLINS and JOHN DOE PREBLE-COLLINS, husband and wife, Defendants/Appellees.	2 CA-CV 2006-0166 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200300617

Honorable Stephen M. Desens, Judge

AFFIRMED

Edward W. Matchett — Bisbee
Attorney for Plaintiffs/Appellants

Cardinal & Stachel, P.C.
By Robert D. Stachel, Jr. — Sierra Vista
Attorneys for Defendants/Appellees

V Á S Q U E Z, Judge.

¶1 In this landlord-tenant dispute, appellants William Lepper and Chris Racus appeal from the trial court's grant of summary judgment in favor of appellee Kathy Preble-Collins, doing business as Sierra Shadows Realty, on their claim for the return of a security deposit and on her counterclaim for breach of contract, both arising out of a written rental agreement. For the reasons discussed below, we affirm.

Facts and Procedural History

¶2 We view the facts and the reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment motion. *Andrews v. Blake,* 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). In December 2002, Lepper and Racus entered into a rental agreement for a house in Sierra Vista. The agreement states, inter alia, "Tenant shall not make any alterations or improvements in any way without Landlord's prior written consent." Preble-Collins was the broker and the property manager for the owner of the house. Pursuant to the lease, Lepper and Racus paid a refundable security deposit of approximately $1,000.[1] Shortly after Lepper and Racus moved into the house, they returned to Preble-Collins a completed move-in inspection form, signed by Racus, which contained several handwritten notations about painting including: "We have purchased white paint to re-paint interior of house." Lepper and Racus contend that, at the time they returned the inspection form, they discussed the need for repainting the interior of the house with Preble-Collins and

[1]According to the lease, the required refundable deposit amounts were a $950 security deposit plus a $50 pet deposit. However, the parties have agreed that the total amount held as a deposit was $1,030.

she gave them verbal permission to paint. Preble-Collins disputes that she had any discussion with Lepper and Racus about painting or that she gave them permission to do so.

¶3 During the lease term, Lepper and Racus repainted the interior moldings, shadowboxes, baseboards, fireplace mantle, interior trim, and interior doors with grey paint. Before being painted grey, the doors were wood-grain, and the trim and molding had been painted white. After Lepper and Racus vacated the premises at the end of June 2003, Preble-Collins notified them that she was retaining their security deposit and billing them an additional $1,024.73 for carpet cleaning, repainting the trim and molding, and replacing the doors. Contending they had had Preble-Collins's permission to paint, Lepper and Racus demanded a refund of their security deposit plus reimbursement for other expenses. Preble-Collins refused Lepper and Racus's demand for payment, denying she had ever given them verbal permission to paint or written permission to do so as required by the lease.

¶4 In September 2003, Lepper and Racus filed a complaint in Cochise County Superior Court against Preble-Collins, claiming she had violated the Arizona Residential Landlord Tenant Act[2] (ARLTA) by, inter alia, withholding their security deposit; a similar claim that she had violated the Consumer Fraud Act[3] (CFA); and for breach of contract. In her counterclaim for breach of contract, Preble-Collins asserted Lepper and Racus had

[2]A.R.S. §§ 33-1301 through 33-1381.

[3]A.R.S. §§ 44-1521 through 44-1534.

breached the lease agreement by painting without her written permission and by failing to have the carpets cleaned upon vacating the premises.

¶5 Preble-Collins filed a motion for summary judgment on all claims in Lepper and Racus's complaint and on her counterclaim. After a hearing, the trial court found there were no issues of material fact with respect to part of Lepper and Racus's ARLTA claim, their entire CFA claim, and their breach of contract claim and granted summary judgment in Preble-Collins's favor on those claims. But the trial court found there were genuine issues of material fact precluding summary judgment on the remainder of Lepper and Racus's ARLTA claim regarding the security deposit as well as Preble-Collins's counterclaim. The court concluded on Lepper and Racus's claim there was an issue whether Racus's notation on the move-in inspection form that "[w]e have purchased white paint to re-paint interior of house" satisfied the requirement in the lease agreement for written permission to make alterations or improvements when "no objection or clarification was made or otherwise sought by" Preble-Collins. The court further determined a genuine issue existed regarding the reasonableness and necessity of deductions from the security deposit.

¶6 Preble-Collins filed a motion for reconsideration of the trial court's ruling, asserting, as a matter of law, that Lepper and Racus did not have the required written permission to paint as they had and that Preble-Collins was therefore entitled to damages. The trial court found that the lease stated "in unambiguous language that a 'Tenant shall not make any alterations or improvements in any way without Landlord's prior written

consent.'" The court further concluded that as a matter of law Lepper and Racus had breached the lease agreement and were contractually liable for damages to the property and granted Preble-Collins's motion for reconsideration. After an evidentiary hearing on the amount of damages, the trial court awarded Preble-Collins $2,810 in damages and $15,786.90 in attorney fees and costs. This appeal from the trial court's order granting Preble-Collins's motion for reconsideration and awarding her damages followed.

Standard of Review

¶7 We review a trial court's grant of summary judgment de novo. *Andrews*, 205 Ariz. 236, ¶ 12, 69 P.3d at 11. Issues of contract interpretation are questions of law also subject to our de novo review. *Id*. "Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *In re Estate of Lamparella*, 210 Ariz. 246, ¶ 18, 109 P.3d 959, 963 (App. 2005). We give the words of a contract their usual, ordinary meaning. *Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993); *Shanks v. Davey Tree Surgery Co.*, 173 Ariz. 557, 560, 845 P.2d 483, 486 (App. 1992).

Discussion

¶8 Lepper and Racus argue the trial court erred in granting Preble-Collins's motion for reconsideration and awarding summary judgment in her favor on their claim for the refund of the security deposit and on her counterclaim for damages. They acknowledge that the lease "contains the requirement that any improvements require written permission

from the landlord." However, Lepper and Racus assert there is a "factual dispute" about "whether painting the interior of a house constitutes an 'improvement' which requires written permission or . . . whether such painting is in the nature of routine maintenance."

¶9 First, in their complaint Lepper and Racus themselves repeatedly referred to the painting and other work they had done in the house as "improvements to the Premises."[4] But we need not decide whether painting constitutes an improvement to property because Lepper and Racus do not dispute the lease also requires written permission for alterations as well. An "alteration" is defined as: "The condition resulting from altering; modification; change." *The American Heritage Dictionary* 99 (2d college ed. 1982); *see also Gannett Outdoor Co. of Ariz. v. City of Mesa*, 159 Ariz. 459, 463-64, 768 P.2d 191, 195-96 (App. 1989) (citing similar dictionary definition of "alteration"). Painting grey the wood-grain doors and white interior trim and molding are clearly alterations within this ordinary meaning of the term. *Cf. id.* (finding destruction and rebuilding of billboard not an "alteration").

¶10 Lepper and Racus nonetheless contend the lease provision requiring written permission to make alterations or improvements "is boiler plate language which was not negotiated but simply included by [Preble-Collins] in the standard form contract." Their assertions are not supported by any evidence that the language was in fact boilerplate, nor

[4]To "improve" something is to "make beneficial additions or changes" to it; thus, an improvement is "[a] change or addition that improves." *The American Heritage Dictionary* 648 (2d college ed. 1982).

do they cite any authority that it should not be given binding effect. We will not develop this argument for them and do not discuss it further. *See Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, ¶ 117, 83 P.3d 573, 600 (App. 2004) (arguments not developed in appellate brief are waived); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (appellate court does not address assertions made without supporting argument or citation of authority).

¶11 Lepper and Racus also argue that "their writing on the [move-in inspection form] combined with the additional discussions with [Preble-Collins] constituted the required permission" to paint. They contend it is for the trier of fact to determine whether "the parties had a legally sufficient agreement . . . to paint." To support their argument, they cite *Pre-Fit Door, Inc. v. Dor-Ways, Inc.*, 13 Ariz. App. 438, 441, 477 P.2d 557, 560 (1970), for the proposition that "it is the rule that where the existence of a contract is the point in issue and the evidence is conflicting or admits of more than one inference, it is for the jury to determine whether the contract did in fact exist." While this is a correct statement of the law as expressed in *Pre-Fit Door*, it is inapplicable to this case because here there is no dispute that a contract (the lease agreement) existed.[5]

[5]To the extent Lepper and Racus argue the notation on the move-in inspection form and alleged subsequent discussion with Preble-Collins, in which she purportedly gave them verbal permission to paint, modified the lease's provision requiring written permission, the argument is without merit. The lease also provides that: "This Agreement can only be modified in writing and signed by Landlord and Tenant." Lepper and Racus have cited no authority that would allow us to disregard this provision in the lease.

¶12 Lepper and Racus's reliance on *Beaudry v. Insurance Co. of the West*, 203 Ariz. 86, 50 P.3d 836 (App. 2002), is likewise unavailing. They cite *Beaudry* for the proposition that "[t]he terms of a contract may be expressly stated or may be inferred from the conduct of the parties. 'The general rule is that the determination whether in a particular case a promise should be implied in fact is a question of fact.'" *Id*. ¶ 10 (citation omitted). Again, this is a correct statement of the law, but Lepper and Racus fail to explain its relevance to this case where the terms of the contract were expressly stated. As the trial court found, the express terms of the lease clearly and unambiguously required Lepper and Racus to obtain Preble-Collins's written permission for any alteration, which, as noted above, included repainting the interior of the house as they did.

¶13 Lepper and Racus's own evidence does not support their position. As we previously noted, the notation on the move-in inspection form states: "We have purchased white paint to re-paint interior of house." Lepper and Racus admittedly repainted the interior moldings, shadowboxes, baseboards, fireplace mantle, interior trim, and interior doors with grey paint. Before being painted grey, the doors were wood-grain, and the trim and molding had been painted white. Thus, despite Lepper and Racus's assertions to the contrary, given the conflicting nature of their own evidence, whether Preble-Collins gave them verbal permission to paint the "interior of the house" white is, although disputed, not a material fact precluding summary judgment. "Summary judgment is appropriate where 'the claim or defense ha[s] so little probative value given the quantum of evidence required, that

reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.'" *Newman v. Sun Valley Crushing Co.*, 173 Ariz. 456, 458, 844 P.2d 623, 625 (App. 1992); *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶14 Lastly, Lepper and Racus argue for the first time in their reply brief that Preble-Collins should be estopped from "insist[ing] that only standard form written permission is acceptable and legally sufficient" because they were misled to their detriment by her giving them verbal permission to paint. The closest Lepper and Racus came to an estoppel argument below was their assertion in their opposition to Preble-Collins's motion for reconsideration that the trial court must render "a fair and equitable decision in this case." They did not support that assertion with citation to relevant authority or for that matter any argument on the theory of equitable estoppel. Thus, this issue is waived for failure to raise and argue it below and we do not address it. *See Romero v. Southwest Ambulance*, 211 Ariz. 200, ¶ 7, 119 P.3d 467, 471 (App. 2005) (issues not presented to trial court are waived on appeal). The issue is also waived for failure to raise and argue it in the opening brief. *See Nelson v. Rice*, 198 Ariz. 563, n.3, 12 P.3d 238, 242 n.3 (App. 2000).

Disposition

¶15 For the foregoing reasons, we affirm the trial court's grant of summary judgment in Preble-Collins's favor. The trial court's award of damages and attorney fees is likewise affirmed. We deny Preble-Collins's request for attorney fees on appeal because she

has not cited any authority for her request. *See Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, ¶ 26, 17 P.3d 790, 795 (App. 2000) (appellate court will not award fees if no basis for award is given). However, as the prevailing party, Preble-Collins is entitled to recover the costs she has incurred in this appeal upon her compliance with Rule 21, Ariz. R. Civ. App. P., 17B A.R.S. *See Kelly*, 199 Ariz. 284, ¶ 26, 17 P.3d at 795.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge